Even Presidents Must Testify

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IN RECENT WEEKS, spokesmen for the Nixon administration have asserted it would be unconstitutional for a President to be interrogated by Justice Department prosecutors, a grand jury, or a congressional committee. The surprising popular acceptance of this fantasy is exceeded only by its total lack of legal foundation. If allowed to stand, this unsound doctrine may hamper the Watergate investigation severely and open the door to possible future abuse of executive power.

We hear three basic arguments in defense of what might be called "presidential immunity."

First, Mr. Nixon's press secretaries have repeatedly told us it would be "constitutionally inappropriate" for a President to testify, under subpoena or otherwise, because such questioning would violate the constitutional separation of powers.

This is peculiar reasoning from those who have declared themselves advocates of "strict construction" of the Constitution. The law is not based on someone's vague feelings about what he thinks the Constitution *ought* to say; rather, an assertion of "Constitutional inappropriateness" must refer to something the Constitution *does* say. That the administration spokesmen make no such reference is not surprising, since they have nothing to which they can refer. Nowhere in the Constitution is there anything that can be strictly—or even remotely—construed as providing presidential immunity to judicial or congressional investigation.

The founding fathers knew how to prescribe immunity. They gave it to members of Congress, under precisely described conditions, in the first article of the Constitution. Had they intended to give immunity to the President, they could have done so. Since they did not, we must conclude the omission was deliberate. If Mr. Nixon would like to propose an amendment to give himself and his successors immunity from the law while in office, he is free to do so—although I doubt it would pass. But since there is no such amendment, let us stop reading into the Constitution something that isn't there. Let us leave poetic license to the poets.

Second, it is said a President cannot be subpoenaed because, were he to disobey the subpoena and be imprisoned, the government would be unable to function.

This argument presents two possibilities: Either the President could conduct the business of government from jail or he could not. If he could, the objection is invalid on its face. If he could not, it would be incumbent upon him under the 25th Amendment to notify the speaker of the House and the president pro tem of the Senate of his inability to discharge the duties of his office, whereupon the Vice President would become Acting President until the President emerged from jail. In neither case would the nation be forced to operate without a President.

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Hamilton vs. the Court

THIRD, Alexander Hamilton wrote in the Federalist Papers that "the President of the United States would be liable to be impeached, tried, and upon conviction of . . . high crimes or misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law." The key word "afterwards" suggests Hamilton did not envision prosecution while the President was in office.

Hamilton's views should be taken seriously. But since this condition does not appear in the Constitution, we must conclude it was not the prevailing view of the founding fathers. In any case, Hamilton's suggestion is of less consequence than two Supreme Court decisions specifically rejecting executive immunity.

First, there is the 1807 opinion of Chief Justice John Marshall himself in *U.S. v. Burr*. The question was whether President Thomas Jefferson could be required to respond to a subpoena (the court held he could):

"In the provisions of the Constitution, and of the statutes which give to the accused a right to the compulsory process of the court, there is no exception whatever. . . . It cannot be denied that to issue a subpoena to a person filling the exalted position of the chief magistrate (i.e., the President) is a duty which would be dispensed with more cheerfully than it would be performed; but, if it be a duty, the court can have no choice in the case."

Second, there is the 1972 Supreme Court opinion in *Branzburg v. Hayes*. This was the decision rejecting special immunity for newsmen. Writing for the court, Justice White said:

"Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the long-standing principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, is particularly applicable to grand jury proceedings."

In a footnote, the court noted approvingly that "Jeremy Bentham vividly illustrated this maxim: 'Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach, while a chimney-sweeper and a barrow-woman were in dispute about a halfpenny-worth of apples, and the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly.' "

Note that, while this opinion was written by Justice White, a Kennedy appointee, he was joined by all four Nixon appointees: Burger, Blackmun, Powell and Rehnquist. Mr. Nixon told us he appointed these men because he wanted "strict construction" of the Constitution. Now let us have it. Let us stop allowing the President to assume mystical powers and immunities not provided by law. If the President's testimony is demanded by the Ervin committee, by the Cox investigation, or by any other body possessing subpoena powers, he must comply. Even the President cannot set himself above the law.